SUPREME COURT, U. S.

Supreme Court, U. S.
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IN THE

Supreme Court of the United States

October Term, 1973

No. 73-1093

STATE OF CALIFORNIA,

Petitioner,

vs.

ROBERT JAMES PASCHALL,

Respondent.

On Writ of Certiorari to the Court of Appeal of the State of California, Second Appellate District, Division Five

PETITION FOR WRIT OF CERTIORARI

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On Writ of Certiorari to the Court of Appeal of the State of California, Second Appellate District, Division Five

PETITION FOR WRIT OF CERTIORARI

Petitioner State of California respectfully prays that a writ of certiorari issue to review the judgment of the Court of Appeal, Second Appellate District, Division Five of the State of California entered on August 31, 1973. A petition for rehearing was denied on September 17, 1973; one justice voting to grant a rehearing. The petition for hearing in the California Supreme Court was denied on October 31, 1973.

Opinion Below

The opinion of the California Court of Appeal is unpublished pursuant to Rule 976 of the California Rules of Court. A copy of the opinion is attached hereto as Appendix A.

Jurisdiction

The judgment of the California Court of Appeal, which considered the issue presented herein, was entered on August 31, 1973. A timely petition for rehearing, in which the within issue was raised, was denied on September 17, 1973, one justice voting to grant a rehearing. A timely petition for hearing in the California Supreme Court, in which the within issue was raised, was denied on October 31, 1973. This Court's Jurisdiction is invoked under 28 U.S.C. § 1257(3).

Question Presented

Whether the rule announced in *Harris v. New York*, 401 U.S. 222 (1971), which permits impeachment of a defendant with voluntary statements obtained from him without a required *Miranda* warning, applies to cases where the defendant is given the required *Miranda* warning but his waiver of those rights is invalid by *Miranda* standards.

Constitutional Provisions Involved

United States Constitution, Amendment V, in relevant part:

> "[N]or shall [any person] be compelled in any criminal case to be a witness against himself."

United States Constitution, Amendment XIV, section 1, in relevant part:

> ". . . No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Statement of the Case

A. Procedural Background

In a jury trial respondent was found guilty of burglary of the first degree in violation of sections 459 and 460 of the California Penal Code and of assault with the intent to commit rape in violation of section 220 of the California Penal Code. [Appendix A, p. 1; Cl. Tr.[1] pp. 60-62.] Respondent was sentenced to the state prison for the term prescribed by law. It was ordered that the sentence on Count II merge with the sentence on Count I. [Appendix A, p. 1; Cl. Tr. p. 65.] Respondent appealed to the California Court of Appeal [Cl. Tr. p. 66], which reversed the judgment on the ground that respondent's out-of-court statement to the police was not admissible for purposes of impeachment under *Harris v. New York, supra,* 401 U.S. 222 (1971). The court held the statement was not admissible under *Harris* because after appellant had been advised of his rights and had invoked his right to remain silent, the officer had told appellant he just "wanted to hear his side of the story" and since he had invoked his rights, his statement could not be used against him. The court reasoned that the officer's statement to respondent precluded a valid waiver of *Miranda* rights. The court concluded that since the waiver was involuntary under *Miranda v. Arizona,* 384 U.S. 436 (1966), respondent's statement was involuntary and inadmissible under *Harris v. New York, supra.* In essence, the Court of Appeal engrafted the waiver rules of *Miranda* onto the rule announced in *Harris.* (Appendix A, pp. 7-9.)

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[1]As used in this petition, "Cl. Tr." refers to the Clerk's Transcript which was part of the record in the State appeal, and "Rep. Tr." refers to the Reporter's Transcript which was also part of the record on appeal.

B. Statement of Facts

On March 10, 1970, at about 7:30 p.m., Miss Kimiko Jano, who was fully dressed, returned to her apartment, located at 446 South Rampart Boulevard in Los Angeles. When she entered her apartment, respondent grabbed her and choked her so hard that she became unconscious. [Rep. Tr. pp. 13-34, 135-39.] She remained unconscious for about 15 to 20 minutes. When she regained consciousness, she was lying naked on her bed. Respondent again choked her while she begged him to release her. [Rep. Tr. pp. 140-41.] They struggled and at some time during the struggle, Miss Jano grabbed respondent's wrist watch and threw it on the floor. She also scratched respondent on his chest. [Rep. Tr. pp. 141-44.] Miss Jano testified that several minutes thereafter, the manager of the apartment, who was respondent's mother, knocked on the door, opened it and told respondent to dress and leave.[2] Respondent complied with her request. [Rep. Tr. pp. 144-46.]

Respondent was arrested the following day. At the time of his arrest, the police observed abrasions on his chest. They searched him and found a key to the victim's premises and also $123. [Rep. Tr. pp. 314-16, 350.] The victim, Miss Jano, discovered that $60 plus some coins she collected were missing from her apartment. [Rep. Tr. pp. 147-48.]

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[2]Respondent's mother, who testified in behalf of respondent in the trial, denied seeing respondent in Miss Jano's apartment. However, respondent's mother admitted that Miss Jano stated that respondent had raped her and that she observed Miss Jano holding her neck. [Rep. Tr. pp. 591, 596, 601-02.]

C. Facts Pertaining to the Impeachment Issue

Prior to respondent's pertinent testimony on direct examination, proceedings were held outside the presence of the jury on the issue of whether respondent's statement to an officer could be used for impeachment purposes.

Officer Robert J. Wilson of the Los Angeles Police Department testified that on March 11, 1970, at about 11:00 a.m., he had a conversation with respondent in the city jail. He advised respondent of his *Miranda* rights. Respondent said he did not want to waive his right to remain silent. [Rep. Tr. pp. 347, 396-97.] The officer informed respondent that since respondent had terminated the conversation by invoking his right to remain silent, anything respondent would tell him could not be used in court. He told respondent that he just "wanted to hear his side of the story."[3] [Rep. Tr. pp. 347, 396-97.] Respondent then told the officer that he was in Miss Jano's room when she entered. He gained entry by the use of his mother's key to the apartment. After Miss Jano entered, they both removed their clothes. Subsequently, respondent's mother entered and he left. [Rep. Tr. pp. 400-01.]

The trial court ruled that the officer did not use coercion to obtain the statement and that if during respondent's testimony on direct examination, he were

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[3]The officer's statement was made in good faith in that he did not even make any notes regarding the conversation because it was his opinion that he would not be able to use anything respondent said against respondent in any court proceeding. [Rep. Tr. pp. 617-18.]

to take a position "adverse" to his out-of-court statement, the district attorney would then be allowed to cross-examine respondent on his statement and put on other proof of that statement. [Rep. Tr. p. 428.]

Respondent disregarded the warning of the trial court and during direct examination testified that the victim invited him into her apartment. They talked to each other and eventually an argument ensued. Respondent further testified that while he was in her room, he was fully dressed and did not hear a knock on her door. [Rep. Tr. pp. 431-38.]

During cross-examination, the prosecution was permitted to examine respondent regarding the subject of his out-of-court statement to the officer. Respondent admitted that he told a police officer that he obtained entry to the victim's apartment by obtaining a key, but also testified that his statement to the officer was untrue. He further testified that he told the officer that he and the victim were unclothed and that his mother entered the room. [Rep. Tr. pp. 510-12.] Officer Wilson testified as a rebuttal witness to the aforementioned statement which respondent made. [Rep. Tr. pp. 608-09.]

REASONS WHY CERTIORARI SHOULD BE GRANTED

I

This Case Presents the Following Important Constitutional Questions Concerning the Proper Interpretation of Harris v. New York, 401 U.S. 222 (1971): Does Harris Apply Only to Cases in Which No Miranda Warning Is Given, or Does It Apply Where the Warning Is Given but the Waiver of Rights Is Invalid, Where the Resulting Statement Itself Is Trustworthy and Voluntary

In *Harris v. New York*, 401 U.S. 222 (1971), this Court limited *Miranda v. Arizona*, 384 U.S. 436 (1966), in holding that a defendant may be impeached through the use of voluntary statements obtained from him without the necessary *Miranda* warnings. *Harris* was a case where the suspect's statement was inadmissible as part of the prosecution's case in chief because he had not been advised of his *Miranda* rights. The Court's rationale was clearly stated:

> "The shield provided by Miranda cannot be perverted into a license to use perjury by way of a defense, free from the risk of confrontation with prior inconsistent utterances. . . ." *Harris v. New York, supra*, 401 U.S. at 226.

The instant case presents a different kind of *Miranda* violation. Respondent here was properly advised of his rights, but the waiver of those rights was invalid under *Miranda* because respondent initially invoked his rights and he made his statements only after the officer stated that he "just wanted to hear his side of the story" and that anything he said could not be used in court. [Rep. Tr. pp. 347, 396-97.]

Although the statements of respondent in the instant case were used solely for impeachment, and the trial court had held a hearing and ruled that the statements were not coerced and could be used for impeachment if respondent testified in his own behalf in a manner inconsistent with his statements, the California Court of Appeal reversed respondent's conviction, holding that the statements were inadmissible for impeachment under *Harris.* The California Court of Appeal reasoned that the invalid waiver of rights made respondent's statements "involuntary" and hence inadmissible even for impeachment purposes under *Harris.* (Appendix A, pp. 7-8.)

Petitioner respectfully submits that the California Court of Appeal has misunderstood the "voluntariness" requirement implicit in *Harris* and has confused validity of the *Miranda* waiver—which we submit is not required by *Harris*—with voluntariness of the suspect's statement—which is required by *Harris* and which is present here. The reasoning of the California Court of Appeal is contrary to the rationale of *Harris,* prevention of perjury, and is inconsistent with the following statement in *Harris:*

> ". . . It does not follow from Miranda that evidence inadmissible against an accused in the prosecution's case in chief is barred for all purposes, *provided of course that the trustworthiness of the evidence satisfies legal standards.*" *Harris v. New York, supra,* 401 U.S. at 224. (Emphasis added.)

When this Court noted in *Harris* that ". . . Petitioner makes no claim that the statements made to the police were coerced or involuntary" (401 U.S. at 224), it is petitioner's contention here that the Court meant only

that "the trustworthiness of the evidence satisfies legal standards." (*Id.* at 22).

By focusing on the validity of respondent's waiver of *Miranda* rights, rather than on the voluntariness, *i.e.* trustworthiness, of his statement itself, the California Court of Appeal has misconstrued the purpose of *Harris*. Under this interpretation of *Harris*, statements of a defendant are admissible for impeachment only where the defendant was not advised of his *Miranda* rights. A whole separate category of cases, represented by the instant example, is excluded from the application of *Harris* under this interpretation. Under the California Court of Appeal's analysis, if the suspect is advised of his rights but the waiver thereof is invalid as judged by *Miranda* requirements, the statement is "involuntary" and inadmissible for impeachment under *Harris*.

Petitioner asks this Court to grant certiorari to clarify and define the "coerced or involuntary" statement (401 U.S. at 224) exception implicit in *Harris* and to declare that a statement is "voluntary" and admissible for impeachment purposes under *Harris* where the statement is trustworthy and reliable, irrespective of whether the suspect validly waived the *Miranda* rights he was given.

This interpretation which petitioner urges is consistent with the rationale of *Harris*, which is to permit the trier of fact to assess the credibility of the defendant by hearing his prior inconsistent statements where he chooses to take the witness stand and commit apparent perjury. Under this rationale unreliable, untrustworthy statements are "involuntary" and inadmissible even for impeachment because they do not aid, but rather con-

fuse, the trier of fact in assessing credibility. Trustworthy, reliable statements are "voluntary" and admissible for impeachment under *Harris* because they are valuable, credible aids to the trier of fact in assessing credibility. *See Brooks v. United States*, 449 F.2d 1296 (9th Cir. 1971); *Inmates of Attica Correctional Facility v. Rockefeller*, 453 F.2d 12, 27 (2d Cir. 1971) (Oakes, J., concurring).

Prior to *Miranda*, the decisions of this Court were clear that statements of a suspect were admissible in the case in chief providing that they were obtained freely and voluntarily. It made no difference that the statements were obtained after interrogation as long as the free will of the suspect was not overcome. *Lyons v. Oklahoma*, 322 U.S. 596, 600 (1944); *Ashcraft v. Tennessee*, 322 U.S. 143, 154 (1944); *Hysler v. Florida*, 315 U.S. 411, 413 (1942); *Wilson v. United States*, 162 U.S. 613, 622 (1896). Petitioner construes *Harris* as a departure from the mechanical application of the prophylactic *Miranda* rules, and, at least for the purpose of impeachment, a return to the voluntariness standard of pre-*Miranda* cases. The officer's statement to respondent that he just "wanted to hear his side of the story" and that respondent's statement could not be used in court would not have rendered respondent's statement "involuntary" under pre-*Miranda* standards. By focusing on the validity of the waiver judged by *Miranda* standards, the California Court of Appeal has limited the application of *Harris* to situations where the suspect was never advised of his rights. This petition raises the important question of whether a suspect's waiver may be invalid under the rules established by *Miranda*, but his statement may nevertheless be trustworthy and "voluntary" under *Harris*.

Respondent's statement was voluntary and trustworthy. The fact that the officer, in good faith[4] told respondent that he just "wanted to hear his side of the story" and any statements would not be used against him did not overcome the free will of respondent and make his statement constitutionally involuntary. No fear was created and no promise of leniency was made. Hence, respondent's statements were made freely without coercion. The reliability and trustworthiness of the statement is self-evident. Without the limitations contained in *Miranda,* the statement would be admissible. Those limitations were removed in *Harris* for the purpose of allowing the prosecution to employ the truth-testing device of impeachment and thereby aid the trier of fact in obtaining the truth.

II

This Is an Appropriate Case to Clarify Conflicts and Ambiguities in Both Federal and State Court Decisions Construing Harris

The instant factual situation illustrates precisely the kind of case in which *Harris* was meant to apply. The credibility of the prosecutrix and of respondent was, from a practical standpoint, the single issue before the jury here, as it generally is in a sex case. In such cases the jury is generally instructed, and was instructed here, that such charges are easily made and

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[4]The officer had no thought of using the statements in court because of *Miranda,* and he did not even make notes of the conversation for that reason. [Rep. Tr. pp. 617-18.] Respondent's statement might have convinced the officer that respondent was innocent and could have resulted in his release. Moreover, the statements were *not* used against respondent in the case in chief and would not have been used at all had not respondent taken the stand and told a conflicting story to the jury. Thus, there was no bad faith or unconscionable unfairness present as to the officer's or the prosecutor's conduct.

difficult to defend against, and that for such reason the law requires the jury to examine the testimony of the prosecutrix with caution. [Cl. Tr. p. 52.] *See People v. Nye*, 38 Cal.2d 34, 39-40, 237 P.2d 1, 4 (1951). In view of the special burdens faced by the prosecutor and prosecutrix in a sex case, it is especially important that the defendant be prevented from further tipping the scales of justice in his favor by using the *Miranda* decision as a shield for perjury. This was the purpose of *Harris* and its purpose is particularly applicable to the instant sex case where the question of credibility is crucial.

There has been considerable criticism in the press and the media recently that women labor under special disabilities in rape cases and that justice to rape victims is too infrequently accomplished. Decisions such as the instant one, if not overturned by this Court, do much to foster such criticism. Here the trial judge held a hearing out of the presence of the jury before respondent took the stand and held that if respondent took the stand and testified inconsistently with his statement to the police, his statement could be used for impeachment. [Rep. Tr. p. 428.] Respondent chose to disregard the trial judge's admonition. He should not be permitted to use *Miranda* as a shield for perjury. The jury should not be kept in the dark concerning crucial evidence bearing on respondent's credibility, his prior inconsistent statement to the police. Does *Miranda* permit, or does *Harris* prevent, the kind of miscarriage of justice that is likely to occur if respondent's prior inconsistent statement is kept from the jury? That is the question presented by this petition for certiorari.

Granting this petition will establish uniformity of decision and eliminate confusion throughout state and

federal courts as to the proper interpretation of *Harris*. For example, the instant case illustrates one interpretation of *Harris*, in which an invalid waiver is held to render the resulting statement involuntary, without regard to its trustworthiness. Other jurisdictions have given a similar restrictive reading to *Harris*. *See United States v. Skillman*, 442 F.2d 543, 551 n.6(a), *cert. denied*, 404 U.S. 833 (1971); *People v. McColor*, 36 Mich. App. 455, 194 N.W.2d 99, 100 n.2 (1971); *State of New Jersey v. Slobodian*, 120 N.J. Super. 68, 293 A.2d 399, 402 (1972). Contrary to these cases, other decisions have held that the issue under *Harris* is whether the statement is voluntary. *United States v. Penta*, 475 F.2d 92, 94 (1st Cir. 1973); *United States ex rel. Wright v. La Vallee*, 471 F.2d 123, 125 (2d Cir. 1972); *United States c. McIntyre*, 467 F.2d 274, 277 (8th Cir. 1972); *Commonwealth v. Harris*, 295 N.E.2d 687, 692 (Mass. App. 1973); *Crain v. Commonwealth*, 484 S.W.2d 839, 841 (Ky. App. 1972); *State v. Kassow*, 28 Ohio St.2d 141, 277 N.E.2d 435, 439 (1971); *Ruffin v. United States*, 293 A.2d 477, 480 (D.C. Cir. 1971). Finally, some cases have held that the issue under *Harris* is whether the statement is trustworthy. *Brooks v. United States, supra*, 449 F.2d 1296 (9th Cir. 1971); *Wold v. State*, 57 Wis.2d 344, 204 N.W.2d 482, 489-90 (1973).

This confusion should be resolved by this Court and the instant case presents a clear legal issue and a factual situation which presents that legal issue dramatically.

Finally, we note that this Court has very recently granted certiorari in *Tucker v. Michigan*, No. 73-482. One of the issues there appears to be whether leads discovered through a defendant's statement obtained in

violation of *Miranda* are admissible under the rationale of *Harris v. New York, supra.* The instant case poses related issues concerning the interpretation of *Harris* as to the limitations it has placed on *Miranda.* In this regard, it is clear that both this case and *Tucker* concern the issue of the permissible methods which may be employed to enable the trier of fact to obtain the truth. Therefore, it is submitted that the instant case would be an excellent companion case to the *Tucker* case in settling the numerous conflicts which have arisen in both federal and state cases.

Conclusion

For the foregoing reasons, petitioner respectfully requests that this petition for a writ of certiorari be granted.

Respectfully submitted,

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APPENDIX A

Opinion of the Court of Appeal

In the Court of Appeal of the State of California, Second Appellate District, Division Five.

The People, Plaintiff and Respondent v. Robert James Paschall, Defendant and Appellant. 2d Cr. No. 23008. S.C. No. A282702.

Filed: Aug. 31, 1973.

APPEAL from a judgment of the Superior Court of Los Angeles County. Jack E. Goertzen, Judge. Reversed.

Albert D. Silverman, under appointment by the Court of Appeal, for Defendant and Appellant.

Evelle J. Younger, Attorney General, Edward A. Hinz, Jr., Chief Assistant Attorney General, William E. James, Assistant Attorney General, and James H. Kiline and Donald F. Roeschke, Deputy Attorneys General, for Plaintiff and Respondent.

By information, defendant was charged in Count I, with burglary (Pen. Code, § 459), and in Count II, with assault with the intent to commit rape (Pen. Code, § 220). Defendant pleaded not guilty and was tried by jury. Defendant was found guilty as to both counts and was sentenced to state prison for the "term prescribed by law, on merged counts." Defendant appeals.

At trial, the victim, Kimiko Jano, testified that on March 10, 1970, she left her apartment at approximately 6:30 a.m. and returned carrying bags of groceries at approximately 7:30 p.m. Upon her return, she unlocked her apartment door and entered. Jano then went into her kitchen, but before she could set down

her groceries, defendant, whom Jano knew to be her apartment manager's son, "came from the kitchen, and grabbed [her] neck, and started choking [her]." Defendant was wearing no clothing. Defendant continued choking Jano and pushed Jano toward, and upon, a bed. Defendant told Jano to "just keep quiet" and continued choking Jano until Jano lost consciousness. Jano regained consciousness approximately 20 minutes later and found that she was undressed. Defendant was lying with her on the bed. Jano did not "think" that she had been raped because she "was on [her] period and . . . had a tampax." When defendant realized that Jano was again conscious, he returned to his attack and began "choking [her] again." Jano begged defendant to leave, but defendant responded: "Just be quiet." Jano and defendant continued to struggle for "several minutes" until there was a knock upon her apartment door. The apartment manager, defendant's mother, then opened the door "and she saw [Jano and defendant] on the floor fighting." The manager then told "defendant to get dressed and go away," and defendant complied. Later that same evening, Jano discovered that $60 and a camera had been taken from her apartment.

At the close of the prosecution's case, defense counsel made a motion for discovery of the recollection of one Sergeant Jerry Wilson as to a conversation between Wilson and defendant at city jail on March 11, 1970. Specifically, defense counsel sought the court's ruling as to whether any of defendant's statements in that conversation may have constituted an "admission . . . , and secondly, whether, if it is determined to be an admission or a declaration against penal interest, [whether] it would be admissible in the light of . . .

Miranda [v. *Arizona,* 384 U.S. 436] . . . and *Harris v. New York* [401 U.S. 222.]" The court, however, denied the motion without prejudice and ordered the defense to proceed.

Defendant then testified on his own behalf that on the date in question, he had been doing maintenance work at the apartment building that was managed by his mother, and that at approximately 6:30 p.m. that day, defendant had seen Jano in the apartment building hallway. At this point in defendant's testimony, however, proceedings were interrupted, and the court stated, out of the presence of the jury, that it had reconsidered defense counsel's discovery motion, and that the "spirit of discovery . . . compel[led]" that the motion be granted.

The discovery proceeding was then commenced out of the presence of the jury, and Wilson testified as follows: On March 11, 1970, Wilson had conversed with defendant at city jail. Wilson had advised defendant of defendant's constitutional rights and then had asked defendant whether defendant wanted "to give up the right to remain silent." Defendant replied: "No." Wilson then told defendant "that since [their] conversation had ended, that anything that [defendant] told [Wilson] could not be used in court and that [Wilson] wanted to hear [defendant's] side of the story." Defendant then told Wilson that he had been in Jano's apartment when Jano returned. Defendant had obtained entry into Jano's apartment by means of a key that he had taken from his mother's apartment. Sometime after Jano had returned, defendant had undressed himself, and Jano had undressed herself, and they made love. Defendant then hit Jano because Jano had become "very nervous and upset,

started screaming, and that this is what [defendant] does to his wife, and [defendant] thought if he did the same thing to [Jano] it would calm her down." Defendant and Jano did not complete their "sex act," and defendant thereafter left because defendant's mother had come into Jano's apartment. Defendant denied taking anything from the apartment.

At the conclusion of the discovery proceeding, defense counsel moved to "suppress any evidence of the statement attributed to [defendant] on the ground that it violates . . . *Miranda* . . . and . . . falls outside the ambit of *Harris v. New York*. . . ." In response to defense counsel's motion, the court ruled that "if the defendant should take a position during this case that is adverse to . . . some of the things he stated to [Wilson], the Court feels that the district attorney is entitled to cross-examine on those, and ultimately put on proof of them by way of impeachment."

The jury was then returned to the courtroom, and defendant continued his testimony on direct examination: After defendant's having encountered Jano in the apartment building's hallway, defendant and Jano entered into a casual conversation, and when they had "walked down as far as [Jano's] room, . . . [Jano] asked [defendant] to come in, have a cup of coffee, or something." Defendant and Jano then entered Jano's apartment. Jano put down "whatever it was that she was carrying," and defendant seated himself on a couch. Jano then seated herself on her bed, and defendant and Jano continued their conversation. Both were clothed. Defendant then said something "to the effect that Jano was a gook whore," and Jano got mad. Jano then stood and approached defendant, and defendant stood. Jano "started to pound on [defendant's]

chest." Defendant "grabbed" Jano's arms, but when he released her, she began to beat and scratch him. Defendant then slapped Jano's face, and left the apartment. Defendant was arrested later that same evening.

On cross-examination, defendant was questioned in regard to the conversation that he had had with Wilson at city jail. Defendant, in response to the cross-examination, testified as follows: Wilson advised defendant of defendant's constitutional rights, and defendant told Wilson that he did not want to waive his rights. Wilson then told defendant that "any statement . . . made could not be used against [him]." Defendant then told Wilson that he had had a key to Jano's apartment, and that he had entered the apartment, but what he had told Wilson was not true, and, in fact, he had not been in Jano's apartment when Jano returned. Defendant did not tell Wilson that he had made love to Jano, but did tell Wilson that he and Jano were unclothed. Defendant did not tell Wilson that he "had to hit [Jano] because that is what [defendant did] to [his] wife under the same circumstances." Defendant told Wilson that his mother had come into Jano's apartment while he was there, but, in fact, his mother had not come into the apartment. Defendant told Wilson that "at some time [he] and . . . Jano were laying [sic] on the bed together."

Wilson was then called as a defense witness and was questioned as to his aforementioned conversation with defendant at city jail.

Defendant's mother, June Kraft, was then called as a defense witness, and testified as follows: On the day in question, sometime after dark, she went to Jano's apartment. Kraft knocked on Jano's door and

heard Jano say "come in." Kraft opened Jano's unlocked door and entered the apartment. Jano was nude, sitting on the side of her bed and holding her throat. Kraft saw no other person in the apartment. Jano made a "complaint" to Kraft, in response, Kraft summoned the police.

At the close of trial, the jury was given the following instruction: "Evidence has been ruled admissible in this case that on some former occasion the defendant may have made a statement or statements that were inconsistent with his testimony in this trial. Such testimony may be considered by you only for the limited purpose of testing the credibility of the witness. Such inconsistent statements, if made, must not be considered by you as evidence in any way of the truth of the matter contained in such statements.[1] It is for you, the jury, to determine whether the statements were made and the effect, if any, such statements have on the credibility of the witness."

On appeal, defendant contends that the court erred in allowing the prosecution to impeach defendant by use of the March 11, 1970 conversation between defendant and Wilson. We agree.

Preliminarily, we note that the court was correct in holding that none of defendant's statements from the conversation could be used for the truth of the statement's contents, but it did not go far enough; the statement should have been excluded in toto. "One of the primary 'protective devices' envisioned by *Miranda* is that requiring that custodial interrogation wholly cease when the suspect indicates in any manner that he

[1]This is an incorrect statement of the law (see Evid. Code, § 1235; *People v. Green*, 3 Cal.3d 981) except in the limited use under the circumstances of *Harris, supra.* (See discussion, *infra.*)

wishes to exercise his Fifth Amendment privilege. A suspect may indicate such a wish in many ways. He may, as in [*People v. Fioritto*, 68 Cal.2d 714,] refuse to sign a waiver of his constitutional rights; he may simply refuse to continue an interrogation already in progress; or he may, as in the instant case, ask for an attorney. 'Without the right to cut off questioning, the setting of in-custody interrogation operates on the individual to overcome free choice in producing a statement after the privilege has been once invoked. *If the individual states that he wants an attorney, the interrogation must cease until an attorney is present.*' (Italics added.) (*Miranda v. Arizona, supra,* 384 U.S. 436, 474 [16 L.Ed.2d 694, 723].)" (*People v. Ireland,* 70 Cal.2d 522, 535-536.) Here, both Wilson and defendant testified that defendant had manifested to Wilson, prior to their conversation, that defendant did not desire to forfeit his right to remain silent. Wilson's ensuing examination of defendant was therefore improper, and defendant's statements made during the course of that conversation could not be introduced for the truth of their contents.

The People argue, however, that notwithstanding the inadmissibility of the statements for the truth of their contents, defendant's statements were nonetheless admissible for the limited purpose of impeaching defendant's in-court testimony. We disagree.

We recognize, of course that in *Harris, supra,* the court held that an accused's custodial interrogatory responses taken in the absence of *Miranda* warnings, though not admissible for the truth of the accused's responses, were admissible for the purpose of impeaching the accused's in-court testimony. In *Harris,* how-

ever, the court stated specifically that the accused "makes no claim that the statements . . . were coerced or involuntary" (at p. 224), and in this regard, the court in *People v. Rice*, 16 Cal.App.2d 337, 344, wrote the following: "*Harris* holds voluntary statements made to officers where no *Miranda* warning is given may be used to impeach a defendant's testimony. This case does not apply here, however. There is no claim that *Miranda* warnings were not given; defendant himself testified they were. But unlike *Harris*, where the [accused] made 'no claim that the statements made to the police were coerced or involuntary,[1] defendant here asserted his statement was involuntary because obtained by a promise of leniency. *Harris* cannot be read as sanctioning the use of involuntary statements for impeachment or any other purpose. . . ." (Cf. *People v. Taylor*, 8 Cal.3d 174, 184-185; *People v. Walker*, 29 Cal. App.3d 448, 453-454.)

Likewise, in the case before us, defendant argues that his statements to Wilson were involuntary because, as Wilson admitted, Wilson had told defendant that "anything that [defendant] told [Wilson] could not be used in court. . . ." We agree. Since *Miranda* has told us that "any evidence that the accused was . . . tricked, or cajoled into a waiver will, of course, show that the [accused] did not voluntarily waive his privilege" (at p. 476), and that "the setting of in-custody interrogation operates on the individual to overcome free choice in producing a statement *after the privilege has been once invoked*" (at p. 474; emphasis added), we must therefore hold that defendant's post-*Miranda*-warnings statements were not voluntary. Therefore, pursuant to the rule of *People v. Rice, supra*, it was error for the court to allow defendant's statements to Wil-

son for the purpose of impeaching defendant's in-court testimony.

The People argue in the alternative, however, that even if defendant's statements should not have been used for impeachment, the error was not reversible. We disagree. Jano testified that defendant had sexually assaulted her, and that the assault had been interrupted by the appearance of defendant's mother. Defendant denied the assault, and defendant's mother denied having seen defendant in Jano's apartment. The case, therefore, turned on credibility, and we cannot say that defendant's impeachment by the use of defendant's conversation with Wilson was harmless beyond a reasonable doubt. (*Chapman v. California,* 386 U.S. 18, 24.)

The judgment is reversed as to both counts.

NOT FOR PUBLICATION.

Stephens, *J.*

We concur:

Kaus, *P. J.*

Hastings, *J.*